Nos. 83-703 and 83-1031

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FLORIDA POWER & LIGHT COMPANY,
Petitioner,
v.
JOETTE LORION, *et al.*,
Respondents.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and THE UNITED STATES OF AMERICA,
Petitioners,
v.
JOETTE LORION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER FLORIDA POWER & LIGHT COMPANY

Of Counsel:
NORMAN A. COLL
STEEL HECTOR & DAVIS
4000 Southeast Financial Center
Miami, Florida 33131-2398
(305) 577-2863

HAROLD F. REIS
Counsel of Record
HOLLY N. LINDEMAN
NEWMAN & HOLTZINGER, P.C.
1615 L Street, N.W.
Washington, D.C. 20036
(202) 955-6600
Attorneys for Petitioner Florida Power & Light Company

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INTRODUCTION

The opinion below, reproduced in the appendix to the petition in No. 83-703,[1] concludes that, although section 189 of the Atomic Energy Act (42 U.S.C. § 2239) and the Administrative Orders Review Act (28 U.S.C. § 2342),

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[1] Cited hereinafter as "Pet. App. ——".

popularly known as the "Hobbs Act," confer exclusive jurisdiction on the courts of appeals to review final Nuclear Regulatory Commission orders in "any proceeding" for the "granting, suspending, revoking, or amending of any license . . .," those statutes do not confer jurisdiction upon the courts of appeals to review orders of the Commission declining a request to suspend a license. The opinion did not suggest that its conclusion was desirable, recognizing that that conclusion does not comport with "the well-founded presumption against bifurcation of judicial forums . . ." or with "notions of judicial economy . . ."[2] Nor did the court below conclude that the legislative history compelled the result.[3] Nor did it express doubts concerning the ability of the courts of appeals to conduct such reviews adequately.[4] Rather, the decision below is apparently based solely upon a reading of section 189 as establishing an "unusual, interlocking scheme" which limits court of appeals jurisdiction to "formal proceedings" conducted by the NRC (Pet. App. 2, 6, 13-14), *i.e.*, those "in which a person may, upon request, demand a hearing" (Pet. App. 5).

In sum then, the decision under review was rendered not because the court below thought the result desirable or one that was intended by Congress. Rather, it is based entirely on the view that the language of section

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[2] Pet. App. 12.

[3] With respect to the legislative history, the court merely concluded that: "There is no evidence in the sparse legislative history surrounding the passage of 42 U.S.C. § 2239 to suggest that Congress envisioned its jurisdictional grant in section 2239(b) to extend beyond orders entered in formal hearings." Pet. App. 13.

[4] The court did consider (Pet. App. 9-10) the reference to that question in Rockford League of Women Voters v. Nuclear Regulatory Commission, 679 F.2d 1218, 1220-21 (7th Cir. 1982). However, the court in Rockford appeared to conclude that considerations of "judicial economy" outweigh court of appeals' "lack of factfinding capacity [which] can be got round in other ways." *Id.* at 1221. Nothing in the opinion below suggests disagreement with this view.

189—as interpreted by that court—compels the result that was reached. And in her brief[5] defending that result, Respondent Lorion also places heavy emphasis upon "the clear intent of the language and structure of section 189 . . ." and related provisions of the Atomic Energy Act.[6]

We believe that the petitioners' main briefs adequately demonstrate why the conclusion below is not in fact compelled by either the language or the history of section 189 and why this Court should reverse. Therefore, this reply brief only addresses three arguments made in Respondent Lorion's brief in support of the decision—arguments which were not in fact depended upon in the opinion.[7]

The first of these is an attempt to establish that the court below "understated the support for its conclusion provided in the legislative history . . ." (Resp. Br. 33) and that Congress indeed intended to confine the scope of section 189 to agency proceedings of the type the court had in mind. The second argument is that the Administrative Procedure Act (5 U.S.C. § 551, *et seq.*), the Atomic Energy Act, or both, require formal adjudicative procedures at every stage of a section 189 pro-

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[5] Hereinafter cited as "Resp. Br. ——."

[6] Resp. Br. 48-51.

[7] This brief does not, of course, attempt to respond in this forum to the allegations contained in Respondent Lorion's brief which suggest that FPL's Turkey Point Unit No. 4 nuclear reactor is operating unsafely because of problems relating to "embrittlement" or "pressurized thermal shock." *See, e.g.*, Resp. Br. 2-3, 96-97. Suffice it to say we strongly disagree with those allegations. For those who may be interested, the general problem and the NRC's plans for dealing with it are described in a proposed regulation which the Commission has published. 49 Fed. Reg. 4498, *et seq.*, (February 7, 1984). Facts bearing on the matter as it specifically relates to Turkey Point Unit No. 4, including details concerning FPL's plans with respect to the matter and the NRC's satisfaction with them, are contained in publicly available correspondence in NRC Docket No. 50-251.

ceeding. The third argument is that if there is court of appeals jurisdiction, the requirements of the Hobbs Act are such that, in any event, a significant proportion of cases will have to be referred to district courts; the administrative decisions will therefore merely "be screened by the courts of appeal before they get to the district courts" (Resp. Br. 5-8), resulting in "trifurcation of review" rather than merely "bifurcation" (Resp. Br. 39). A related argument is that if the record is inadequate for judicial review in a case such as the instant one, a court of appeals would be prevented by the Hobbs Act from remanding for further proceedings, and apparently would therefore have to act on the inadequate record.[8] Again, the inference appears to be that judicial efficiency would be disserved by court of appeals review.

We submit that each of these new arguments is erroneous and fails to support the opinion below.

ARGUMENT

I. THE LEGISLATIVE HISTORY DOES NOT SUPPORT LIMITATION OF SECTION 189 TO "FORMAL PROCEEDINGS"

The main brief for the Federal Petitioners[9] argues (pp. 23-33) that the legislative history supports court of appeals review. In its main brief[10] FPL agreed with the court below that the legislative history is "sparse" but took the position that "[t]he statutory history that does exist favors the view rejected by the Court of Appeals." (pp. 17-18, n.13). Respondent Lorion's brief contends that under subsection (b) of section 189 court of appeals jurisdiction to review final NRC orders was deliberately limited by Congress to proceedings of the type specified

[8] Resp. Br. 67-68.

[9] Hereinafter cited as "Fed. Br. ——".

[10] Hereinafter cited as "FPL Br. ——".

in subsection (a) and that a hearing requirement was imposed with respect to those proceedings,[11] *i.e.*, a hearing was "to be required by law."[12] We do not take issue with this view of the legislative history; however, it does not advance respondent's position. The history sheds no light upon the question when a proceeding of the type enumerated in subsection (a), including a proceeding "for the . . . suspending" of a license, may be regarded as having begun. Consequently, nothing in respondent's recital casts doubt upon the validity of the line of cases holding that a Director's refusal to initiate enforcement action is "a necessary first step" in such a proceeding.[13]

The respondent's discussion of the legislative history demonstrates nothing more than the Congressional intent to specify in subsection (a) of section 189 the categories of agency actions reviewable in the courts of appeals pursuant to subsection (b), but the record goes no farther than this. In particular, it is completely silent as to the level of formality contemplated for the required hearing; as to the stage in a proceeding at which a hearing requirement attaches; and as to the appropriateness of the Commission's adopting an informal process, such as 10 CFR § 2.206, to terminate proceedings not requiring hearings. If anything, the legislative history establishes that Congress was simply not considering such procedural issues when it adopted the interlocking scheme contained in section 189.

[11] Resp. Br. 32-33, 46-47, 60-62. In connection with this argument, emphasis is given to the transfer of the hearing requirement from section 181 of the bill to section 189 and the colloquy between Senators Hickenlooper and Pastore where it was stated that the purpose of the transfer was to "clearly specify the types of Commission activities in which a hearing is to be required." Resp. Br. 35-36, 59-60.

[12] Resp. Br. 61-62.

[13] *See* FPL Br. 12-14; Fed. Br. 16-17.

Congressional silence on these critical questions is consistent with FPL's view that the intent was simply to provide that Commission orders entered in any of the categories of proceedings specified in section 189(a) are reviewable pursuant to section 189(b); and neither the language of the statute nor its legislative history suggests that a proceeding may not be properly terminated by informal means in advance of a hearing. Those conclusions are most consistent with the underlying objective of the Atomic Energy Act: the establishment of a comprehensive, coherent and efficient regime for regulating non-governmental use of nuclear energy.[14]

II. NEITHER THE ADMINISTRATIVE PROCEDURE ACT NOR THE ATOMIC ENERGY ACT REQUIRES FORMAL ADJUDICATIVE PROCEDURES IN SECTION 189 PROCEEDINGS

Based upon the relationship of the Administrative Procedure Act (5 U.S.C. § 511, *et seq.*) to the Atomic Energy Act, Respondent Lorion appears to argue that the *sine qua non* of any section 189(a) proceeding is the availability of formal adjudicative procedures. As respondent observes,[15] section 181 of the Atomic Energy Act makes the provisions of the APA applicable to NRC action taken under Chapter 16 of the Atomic Energy Act.[16] Respondent suggests that the term "proceeding" cannot, therefore, encompass an agency process that does not meet the APA definition in 5 U.S.C. § 551(12).[17] According to respondent, "the principal function of the APA was to prescribe the procedural requirements that agencies must observe in rulemaking, licensing, and adjudicative proceedings while preserving their flexibility to develop other forms of agency process to address other problems as they emerged."[18] The argument appears to be that the APA imposes upon the NRC the obligation to afford certain minimum procedural rights to participants in agency proceedings and that, if these rights are not granted, the agency action cannot be considered a proceeding at all; therefore, it cannot be a proceeding within the meaning of section 189.

This argument is refuted by the APA itself. 5 U.S.C. § 551(12) defines the term "agency proceeding" to include rulemaking, licensing and adjudication. "[A]djudication" is the "agency process for formulation of an order," 5 U.S.C. § 551(7). An "order" is defined as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6). As Davis has explained, "[t]he heart of the definition of 'adjudication' thus is: A final disposition of 'a matter' other than rulemaking." Davis, *Revising the Administrative Procedure Act*, 29 Ad. L. Rev. 35, 38 (1977). In *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975), this Court, considering the effect of a dismissal of an unfair labor practice complaint by the Regional Director of the NLRB, invoked and followed the APA definition, and concluded that "[t]he decision to dismiss a charge is a decision in a 'case' and constitutes an 'adjudication'. . . ." 421 U.S. at 158.[19] By the same reasoning, denial of a 10 CFR § 2.206 enforcement request constitutes an informal ad-

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[14] *See* FPL Br. 18-19.

[15] Resp. Br. 48.

[16] "Judicial Review and Administrative Procedure," 42 U.S.C. §§ 2231-2241.

[17] Resp. Br. 46.

[18] Resp. Br. 49, n.12.

[19] Earlier, in IT&T v. Local 134, 419 U.S. 428, 443-44 (1975), this Court held, with respect to an agency action that did not have the same determinative consequences for a party as did the dismissal in Sears, Roebuck or the Director's decision in the instant case, that the action did not constitute an adjudication within the meaning of the APA.

judication in a proceeding relating to licensing, and is reviewable in the court of appeals.

However, the fact that it is such an adjudication does not trigger application of the APA formal adjudicatory procedures. These are required by that act only in cases "of adjudication required by statute to be determined on the record after opportunity for an agency hearing," 5 U.S.C. § 554(a); *United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224, 241 (1973); *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 758 (1972). That requirement is contained nowhere in the Atomic Energy Act. 5 U.S.C. § 554(a) is therefore simply inapplicable.

Conceivably, it could be argued that, independent of the APA, section 189(a) or some other provision of the Atomic Energy Act requires formal (*i.e.*, "on the record") adjudication in all proceedings referred to in that section—and at all stages of those proceedings. But no court has held that such a requirement exists. To be sure, the question of what type of hearings are required under section 189 has not been definitively settled. On the one hand, in *Union of Concerned Scientists* v. *NRC*, 735 F.2d 1437, 1444-45 n.12 (D.C. Cir. 1984), the court suggested that even though the "on the record" language is missing from section 189(a), a number of considerations point to the requirement of such "on the record" procedures for proceedings under the section. However, the court expressly refrained from deciding the matter because, in the circumstances, the NRC regulations comport with or surpass the APA requirements.

On the other hand, the bulk of the authority is to the contrary. Thus, the D.C. Circuit has upheld a proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees which only encompassed informal notice and comment. *Connecticut Light & Power Co.* v. *NRC*, 673 F.2d 525 (D.C. Cir. 1982). Of course, in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543-48 (1978), this Court made it perfectly clear that the Commission has discretion to issue such rules and regulations upon the basis of the minimum APA notice and comment requirements. *See also Baltimore Gas & Electric Co.* v. *NRDC*, —— U.S. ——, ——, 103 S.Ct. 2246, 2250 (1983). And, even with respect to proceedings for the issuance of certain licenses, including a license to process special nuclear material, by-product material or source material, such informal procedures have been utilized. *City of West Chicago* v. *NRC*, 701 F.2d 632, 641-45 (7th Cir. 1983). In *City of West Chicago*, the court held, with respect to the question whether the governing statute satisfies the "on-the-record" requirement of 5 U.S.C. § 554, that

> in the absence of these magic words, Congress must clearly indicate its intent to trigger the formal, on-the-record hearing provisions of the APA. [Citations omitted]. We find no clear intention in the legislative history of the AEA, and therefore conclude that formal hearings are not statutorily required for amendments to materials licenses.

Id. at 641.

However, even if it is ultimately decided that a full adjudicatory hearing is required for some or all section 189 licensing proceedings, it would not follow that either the APA or the Atomic Energy Act proscribe the use of preliminary screening techniques in the first stage of such a proceeding in order to determine whether the threshold requirements for a hearing—whatever its required degree of formality if conducted—is met. Usage of such screening techniques is widespread and favored by considerations of administrative efficiency.[20] The 10 CFR § 2.206 process serves precisely the same function.

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[20] *See* FPL Br. 14-15; Fed. Br. 18-20.

Respondent Lorion attempts to distinguish the standing and summary disposition line of cases, in which proceedings are terminated without evidentiary hearings, from the screening procedures followed under 10 CFR § 2.206, upon the presence or absence of procedural safeguards, including notice, right of confrontation, and *ex parte* rules to protect the record.[21] This argument suffers from the same logical flaw that undermines respondents' basic case. That is, it assumes that the hearing referred to in section 189(a) necessitates formal trial type procedures at every stage, including the pre-hearing process, and that the employment of informal methods of screening is inconsistent with the requirements of the section, such that the section 2.206 process cannot be a step in a proceeding reviewable in the courts of appeals. Again, respondent ignores the fact that nothing in the Act or in its legislative history precludes the Commission from developing informal procedures to resolve initial questions concerning the necessity for a hearing. Respondent simply—and erroneously—equates "proceeding" with formal evidentiary adjudication.

The more natural reading of the statute, and the interpretation more consistent with the legislative history and the objectives of the Act, is that the proceedings specified in section 189(a) were intended, under section 189(b), to result in orders reviewable in the courts of appeals, as well as to specify the proceedings in which hearings are required. Whether such a proceeding is terminated prior to a hearing because of lack of standing or contentions, by way of summary disposition, or because of a Directors Denial pursuant to 10 CFR § 2.206, the issue on appeal is the agency's application of its discretion. As long as the record is adequate for court of appeals review, nothing in the statute prescribes any particular way in which a proceeding may terminate short of a formal hearing.

[21] Resp. Br. 75-77.

III. THE HOBBS ACT PRESENTS NO SIGNIFICANT BARRIERS TO COURT OF APPEALS REVIEW OF 10 CFR § 2.206 PROCEEDINGS

Respondent Lorion's most novel argument appears to be that, as a practical matter, even if the courts of appeals are held to have jurisdiction to review Directors Denials, because of the operation of the Hobbs Act, a "significant proportion of" the cases will, in any event, have to be transferred to the district courts. Consequently, respondent argues, the "practical issue" presented in this case is not whether those denials should be reviewed in the district courts or courts of appeals, but whether they "should be screened by the courts of appeal before they get to the district courts."[22] This, respondent contends, would result not merely in "bifurcation of review" but in something worse, "trifurcation."[23] The implications are that Congress could not have intended this bizarre consequence when it enacted section 189 and that considerations of efficiency and judicial economy also favor affirmation of the decision below.

The difficulty with the argument is that the postulated consequence is not in fact required. Respondent simply misreads the relevant section of the Hobbs Act, 28 U.S.C. § 2347(b), and misunderstands the process involved in Directors Denials.

Among other things, 28 U.S.C. § 2347(b) provides for court of appeals review of agency proceedings in circumstances in which "the agency has not held a hearing before taking the action of which review is sought." It requires the court of appeals first to determine whether a hearing is required by law. When it makes that determination, paragraph numbered (1) of the provision requires the court to remand the proceeding to the agency to hold a hearing. If the court determines that

[22] Resp. Br. 5-8.

[23] Resp. Br. 39.

a hearing is not required by law, it has two alternatives. If it appears "that no genuine issue of material fact is presented," paragraph numbered (2) requires the court of appeals to "pass on the issues presented." If, however, a "genuine issue of material fact is presented," the court of appeals is required to "transfer the proceedings to a district court . . . for a hearing and determination as if the proceedings were originally initiated in the district court. . . ."

The transfer provision has been rarely used,[24] and obviously it applies only when "a genuine issue of material fact is presented." Consequently, petitioners argue that persons aggrieved by Directors Denials "will frequently be able to demonstrate that there are genuine issues of material fact and thus that transfer to the appropriate district court is required under the Hobbs Act." [25]

However, this statement is based upon a misperception. Actually, what is involved in most Directors Denials, including the instant one, is not a dispute about a "genuine issue of material fact." Respondent Lorion's essential quarrel is not with the accuracy of the facts considered by the Director, but rather with the wisdom of his decision not to institute show cause proceedings. That is an issue of abuse of discretion properly resolvable on the record by the courts of appeals. More generally, the resolution of questions concerning the validity of an agency's exercise of discretion usually cannot practically be furthered by district court fact finding. Where, as here, informal, discretionary agency actions may be set aside only if "arbitrary and capricious," 5 U.S.C. § 706(2)(A), the existence of an issue of material fact is irrelevant to the reviewing court's required determination "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971). Consequently, transfer to a district court would not be required in most cases.

[24] FPL Br. 30, n.25.

[25] Resp. Br. 7; *see also* 37, 67-68, 78-79.

Respondent Lorion makes a further Hobbs Act argument. It is apparently made in response to FPL's suggestion that, while the record compiled by a Director in a 10 CFR § 2.206 proceeding ordinarily provides an adequate basis for court of appeals review, if the record in a particular case should turn out to be inadequate [26] the court may remand the matter to the agency to supplement the record.[27] Respondent Lorion appears to argue that, because of the Hobbs Act, remand for that purpose is not possible and the court will therefore have to act on the basis of an inadequate record. Again, respondent's objective seems to be to illustrate the impractical consequences of court of appeals review.

Her argument appears to be based upon the following chain of reasoning. The courts have held that hearings are not required in 10 CFR § 2.206 proceedings.[28] Where a hearing is not required by law, a "court of appeals has only two choices." If there is presented a genuine issue of material fact, the court of appeals must transfer the proceeding to the appropriate district court pursuant to 28 U.S.C. § 2347(b)(3). However, if no such issue is presented, "then and only then, the court of appeals must pass upon the issue of law presented. 28 U.S.C. § 2347(b)(2)." [29]

[26] It should be noted that, to date, no court has ever found the record compiled in a 10 CFR § 2.206 proceeding inadequate for meaningful judicial review.

[27] FPL Br. 27-31; *see also* Fed. Br. 39, n.32.

[28] Resp. Br. 73-74.

[29] Resp. Br. 67-68 (footnote omitted); *see also* 36-37, 80-81.

However, the Hobbs Act plainly provides for court of appeals review of informal proceedings, for it contemplates review of administrative proceedings "when a hearing is not required by law." And the legislative history makes it clear that provision for such review was deliberately included in the law.[30] It would be anomalous to assume that the Congress conferred exclusive jurisdiction on the courts of appeals to review informal agency action for abuse of discretion, and that, at the same time, it precluded those courts from following what the D.C. Circuit Court of Appeals has described as the "normal course" when a determination is made that an informal agency record is inadequate for such review. Thus in *ITT World Communications, Inc.* v. *FCC*, 699 F.2d 1219 (D.C. Cir. 1983), the court of appeals concluded that the existing agency record was insufficient to permit review, for abuse of discretion, of an FCC order declining to institute rulemaking proceedings. Citing *Camp* v. *Pitts*, 411 U.S. 138 (1973), *United States Lines, Inc.* v. *FMC*, 584 F.2d 519 (D.C. Cir. 1978), and *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971), the court observed that in such a case the "normal course would simply be to instruct the Commission to consider the issues further and develop an adequate record for judicial review." *Id.* at 1248.[31] *See also Environmental Defense Fund, Inc.* v. *Hardin*, 428 F.2d 1093, 1096 (D.C. Cir. 1970), where the court of appeals remanded to the agency in order to obtain "the record necessary for meaningful appellate review" of the issuance of notices of cancellation with respect to certain uses of DDT.

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[30] Hobbs Act: Hearings on H.R. 2915 Before Subcommittee No. 2 of the House Judiciary Committee, 81st Cong., 1st Sess. 28 (1949).

[31] This would not, as respondent assumes (Resp. Br. 48-49, n.12), require an agency hearing when no hearing is required by law.

The Hobbs Act does not in fact deal with the question of how best to supplement an agency record that is deficient for reasons other than inadequate fact finding. The ordinarily appropriate cure for a record insufficient to provide a basis for deciding questions concerning the exercise of agency discretion is remand to that agency for further explanation. In the absence of a clear Congressional prohibition of this "normal course," no such illogical restraint should be assumed; and, as demonstrated above, the courts have in fact made no such assumption. Indeed, as recently as last term, this court affirmed a court of appeals decision to remand a case to the FCC for supplementation of the record, without even discussing possible Hobbs Act restraints on such remand. *FCC* v. *ITT World Communications, Inc.*, —— U.S. ——, 104 S.Ct. 1936 (1984).

Respondents' Hobbs Act arguments are therefore wholly inconsistent with that Act, the realities, or judicial practice or understanding.

CONCLUSION

The respondents' arguments in support of the decision below—none of which were relied upon in the opinion under review—do not provide a basis for affirmance of the decision.

Respectfully submitted,

HAROLD F. REIS
Counsel of Record
HOLLY N. LINDEMAN
NEWMAN & HOLTZINGER, P.C.
1615 L Street, N.W.
Washington, D.C. 20036
(202) 955-6600
Attorneys for Petitioner Florida Power & Light Company

Of Counsel:
NORMAN A. COLL
STEEL HECTOR & DAVIS
4000 Southeast Financial Center
Miami, Florida 33131-2398
(305) 577-2863

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